United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-2352

with affidavits of service (4961)

To be argued by
DAVID W. FISHER

United States Court of Appeals

FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME, AS MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY, HARRY BRONSTEIN, AS CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES: THE CITY OF NEW YORK; ABRAHAM BEAME, AS MAYOR OF THE CITY OF NEW YORK; HARRY BRONSTEIN, AS CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

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Defendants-Appellees.

Statement of the Case

Preliminary Statement

This class action was commenced by the filing of a complaint on January 17, 1974, seeking declaratory and injunctive relief and money damages. The plaintiffs-appellants are a women's group and individually named women plaintiffs who became or were capable of becoming pregnant, and a male claiming to represent male employees suing on behalf of their female dependents who became or were capable of becoming pregnant. The plaintiffs claim that the defendants' practices violate the United States Constitution, the Civil Rights Acts of 1886 and 1964, The New York State Constitution, The New York City Administrative Code and New York City Mayoral Executive Order #71 (April 2, 1968) and #23 (August 24, 1970). The Defendants-Appellees are the City of New York, four of its governmental units, three municipal unions and their respective employee welfare funds and two of the three insurance carriers that provide health coverage for municipal employees.

After the municipal defendants answered the complaint a hearing was held on July 11, 1974 before Hon. Whitman Knapp, where the court *sua sponte* dismissed the complaint with leave to replead, and certified the following question to this Court pursuant to 28 U.S.C. §1292(b):

> "Whether *Aiello* has established—for the purpose of [this] action—that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment."

This Court, by an order entered October 2, 1974, denied plaintiffs' petition for leave to appeal. The plaintiffs notified the district court that they did not intend to amend their complaint. Subsequently, on October 10, 1974, the complaint was dismissed at plaintiffs' request and by notice of appeal of the same date plaintiffs appealed to this Court.

Facts

There are three aspects to plaintiffs' allegations in the complaint. The first, second and third causes allege that the health and hospitalization plans provided by the City to its employees offers fewer benefits for pregnancy and pregnancy-related conditions than for other medical and surgical problems requiring hospital and medical care (27a-35a).* Plaintiffs' fourth, fifth and sixth causes of action allege that the union welfare funds funded by the City treated disability resulting from pregnancy differently from other medical and surgical conditions (36a-39a). Finally, the seventh through eleventh causes of action allege that the City treats maternity leaves differently from leaves taken for other medical and surgical purposes (39a-42a).

(a)

The City of New York provides its employees with a basic health insurance program without cost to the employee, but at a cost of approximately $135,000,000 annually to the City (208a). This program is composed of two distinct portions, a hospitalization policy and a medical care part. The hospitalization part is the same for

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* Page references ending in "a" refer to pages in the Joint Appendix on Appeal.

all employees and is underwritten by defendant Associated Hospital Services of Greater New York (Blue Cross) (208a). For medical care, the employee has an option of choosing one of the following three: Major Medical (G.H.I., Type E), the successor to Blue Shield Major Medical, which is operated as separate from the second plan, Group Health Insurance (G.H.I.). The third plan is operated by Health Insurance Plan (H.I.P.) which is not a party to this action (209a). In addition, the employee may choose additional coverage at a nominal fee. The plan and the optional benefits are fully explained in "A Choice of Health Plans." (213a).[1] The optional benefits are not involved in the litigation.

The basic Blue Cross coverage (213a) for City employees provides 21 days of full hospital coverage and 120 days at a 50% rate. There are limitations on the program such as an $80 maximum hospital payment for a normal maternity delivery. In the event of a caesarean section delivery, spontaneous termination of pregnancy during the first six months, an ectopic pregnancy, and certain other surgical terminations, regular hospital benefits are provided from the date of termination. Pregnancy is not the only limitation in the hospitalization coverage. Benefits for polio, certain communicable diseases, pulmonary tuberculosis, mental disorders and removal of tonsils or adenoids are also limited. There is also a $7.25 payment limitation for emergency first aid and use of a hospital's operating room facilities while not a registered bed patient.

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[1] Appellants are well aware of the enclosed booklet "A Choice of Health Plans" and have in fact based this litigation upon certain provisions therein. This booklet is, of course, made available to all City employees for them to understand their health benefits.

For Medical care:

G.H.I. provides a scheduled allowance for all conditions with a broad program of limitations. G.H.I.'s schedule, however, is accepted in full by more than 9,000 participating physicians in the New York metropolitan area and maternity benefits are provided in full if a participating family doctor is used (213a).

G.H.I. Type E is a scheduled allowance plan with the addition of a major medical allowance. This plan contains a limitation on normal maternity delivery, which is not considered a covered medical expense under the medical portion of the policy. There are other limitations in this program: immunization, physical checkups or related diagnostic tests, well-baby care, outpatient psychiatric care and certain foot conditions (213a).

The City plan offers H.I.P. as a third option. H.I.P., which any City employee can elect, provides full maternity coverage to employee or dependent through its system of group practice. This plan involves no deductible, co-insurance, claim forms or out-of-pocket expenses (213a).

All of the health insurance plans provide the same coverage to the dependents of the employees as to the employees themselves (213a), i.e., the male employee receives the same $80 hospitalization allowance for normal delivery for his wife as does the pregnant female employee.

(b)

The union welfare funds are funded by contributions from the City of $350 per annum for each employee in a title covered by the union at a total cost of $100,000,000 annually (211a). The funds may then be used by the

unions, as representative of the employees, to purchase such additional benefits as they see fit to supplement the City's health program or to provide other benefits. For example, the Faculty Conference of the City University of New York provides full maternity benefits and the Policemen's Benevolent Association provides an additional $70 maternity benefit (211a). This coverage is extended to all employees in the title covered by the union whether the employee is a member of that union or not. Certain unions have chosen what is commonly known as disability coverage as part of the additional benefit to be offered to the covered City employees while other unions offer no such benefits. The disability coverage offered by each union is unique to that union (211a).

One defendant union welfare fund (Social Services Employees Union Welfare Fund) does offer to its covered employees benefits for pregnancy-related disabilities and has made payments arising from pregnancy-related disabilities of several of the named plaintiffs (114a-118a).

(c)

The remainder of the plaintiffs' complaint deals with the maternity leave policies of the municipal defendant which are no longer in effect (59a, 60a). In addition, these former policies are presently being litigated before the District Court, Southern District of New York, in the case of *Monell, et al.* v. *The Department of Social Services, et al.*, 71 Civil 3324 (214a-216a).

ARGUMENT

There are no allegations evincing sex discrimination on the part of appellee governmental agencies or officials with respect to either disability benefits administered by defendant welfare funds or hospital and medical benefits contracted for by the government. The issues with respect to leave policies are moot, the policies having been changed prior to the institution of this lawsuit.

I. The decision in *Geduldig* v. *Aiello* 417 U.S. 484 (1974), which decided that distinctions based on pregnancy are not sexually discriminatory, is dispositive of the issues in the instant case.

In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), the Supreme Court held that excluding normal pregnancy from coverage under a State of California mandatory employees disability insurance plan did not discriminate on the grounds of sex (gender), and stated (at pages 496-7):

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not."

The Appellants allege that *Aiello* (*op. cit.*) does not control as to the Title VII issues of the instant case as *Aiello* was decided under the Fourteenth Amendment, and that the Title VII prohibitions against discrimination are more stringent than the Fourteenth Amendment

(Appellants' Brief, p. 12) and, therefore, the program justified by the U.S. Supreme Court in *Aiello* was judged on standards which are inapplicable to the instant case. This argument, however, does not approach the threshold question of discrimination answered in *Aiello* and discussed by the district court.

In *Communications Workers of America* v. *American Telephone and Telegraph, Long Lines Division,* 379 F. Supp. 679 (S.D.N.Y. 1974)[2] Judge Knapp, at p. 682, clearly points out that:

> ". . . if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such . . . was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it will be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII which deals only with discrimination 'because of . . . sex' 42 U.S.C. §2000e-2(a)(1)."

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[2] This case was heard together with the instant case in the District Court. There was one joint opinion.

Judge Knapp refuted Appellants' contentions by showing that they do not go to the two immediate problems in our case, i.e., does a discriminatory situation exist and the forming of *Aiello* into a two-stage system for exposing such situations. Judge Knapp outlines this two-stage system as follows, at page 682,

> "The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified—or less justifiable in the employment context than in some other context—can never be reached."

Thus in the instant case, the stage one question of "whether disparity of treatment between pregnancy related disabilities can be classified as discrimination because of sex (or gender)", has been disposed of by the U.S. Supreme Court. In *Aiello,* footnote 20 to the majority opinion, declared by Judge Knapp to be "the key to [Supreme] Court's decision", the Court "flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)", 379 F. Supp. 679 at page 681. Footnote 20 of *Aiello,* which clearly rejects the view of the dissenters that the State's action involved discrimination *per se,* states:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed,* 404 U.S. 71, and *Frontiero* v. *Richardson,* 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—preg-

> nancy—from the list of compensible disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

The Court's position is "synthesized" in the second paragraph of the footnote:

> "The lack of identity between the excluded disability and gender as such becomes clear under the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." (417 U.S. at 496-7).

Similarly, in the instant case, the lack of identity between benefit recipients and gender is made even clearer than in *Aiello* by the appellants' inclusion of a male, claiming for his wife, as a party Plaintiff. Thus, appellees' program of health and hospitalization, which is administered equally to all employees, whether the employee under whom the family claims is male or female, is clearly

non-discriminatory, as shown by *Aiello*. Normal pregnancy, therefore, is clearly a reasonable, proper and non-invidious insurance program exclusion (See, 379 F. Supp. at 681, citing *Aiello*, "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause").

The second stage question discussed by Judge Knapp—"Whether such disparity is justified—or less justifiable in the employment context than in some other context" is "never reached." The appellants' claims that the Title VII allegations are not controlled by the Supreme Court's decision in *Aiello* is, then, not the issue.

> "At oral argument in the case at bar, counsel for both sets of plaintiffs and counsel for the EEOC as *amicus curiae*, insistently argued that *Aiello* is distinguishable on many grounds. The most significant distinction was said to be that the instant cases involve disparate treatment by employers—private as well as municipal—of pregnant employees, while *Aiello* involved a social welfare policy created by state legislation. While deference is to be shown to legislative judgments on social welfare matters, the argument goes, no such deference to allegedly discriminatory employers is warranted under Title VII.
>
> *The flaw in this argument is that it begs the question.* The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, *then the further question of whether such disparity is justified—or less justifiable in the employ-*

> *ment context than in some other context—can never be reached.*" (emphasis supplied) 379 F. Supp. at 682.[3]

Appellants' reliance on *Union Free School District* v. *N.Y. State Human Rights Appeal Board,* 35 NY 2d 371 (1974) is misplaced. That action involved personnel policies which single out childbirth among other conditions for special treatment in fixing terms of compensation and of return to employment thereafter. In *Union,* the action was predicated on the New York State Human Rights Law (Executive Law, Art. 15). The policy of the City and the Board of Education with respect to leave policies is no longer in issue having been changed prior to the commencement of this action. Further, in the same manner as the New York Court of Appeals indicated that it would not be bound by a declaration by the United States Supreme Court on pregnancy and maternity benefits, for the purpose of the New York Court applying its State's Human Rights Law, this Court is of course in no way bound by the state court's interpretation of *Aiello.*

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[3] It is significant that in the brief submitted by the EEOC as *amicus curiae* for the plaintiff in *Aiello* v. *Hansen,* 359 F. Supp. 792 (N.D. Calif. 1973), reversed *sub nom. Geduldig* v. *Aiello,* 417 U.S. 484 (1974), the Commission stated that:

> "The United States Equal Employment Opportunity Commission files this brief because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-*et seq.,* as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972)."

In this case, the absence of sex discrimination with respect to health and hospitalization benefits is made evident by the fact that one of the plaintiffs-appellants is a male, Robert Sussman, and the class represented include ". . . (b) males employed by the City during the same period of time [April 22, 1968 to the date of the complaint], who, at any time during this period had a wife or female dependent capable of becoming pregnant or who became pregnant" (4a). Thus, the complaint in this respect can be read as claiming the impossible, to wit, sex discrimination against 167,000 male employees and 76,000 female employees who receive the identical City family health insurance (208a, 213a). *Cf. Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); *Reed* v. *Reed,* 404 U.S. 71 (1971); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

The district court's decision in this case is clearly correct, in light of the decision in *Aiello,* and, the appellants' arguments as to the alleged differences between Title VII and the Fourteenth Amendment notwithstanding, should be affirmed.

In any event, this Court has the power to affirm the dismissal of the complaint on grounds other than those stated by the district judge. In *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the Supreme Court in footnote 6, at p. 475-6, said:

> "It is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower Court or an insistence upon matter overlooked or ignored by it."

See also *Lum Wan* v. *Esperdy,* 321 F.2d 123, 126 (2d Cir. 1963), and *Helvering* v. *Gowran,* 302 U.S. 238, 245 (1937).

II. Assuming *arguendo* that Judge Knapp erred in his interpretation of *Aiello* and that Title VII and assuming the E.E.O.C. guidelines relating to health and hospitalization are applicable, still the allegations of the complaint relating to such benefits fail to state a cause of action and that the dismissal should be affirmed by this Court.

In *Satty* v. *Nashville Gas Company,* 9 EPD ¶9919 (U.S. District Court, M.D. Tenn. 1974), plaintiff brought an action under Title VII of the Civil Rights Act of 1964 alleging sex discrimination in defendants employment policies with respect to pregnancy on the theory that it discriminated because of reduced benefits paid in the case of pregnancy when compared with hospitalization for other causes. The Court rejected the argument holding that "for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff," and that there was no violation of the EEOC guidelines on fringe benefits (Title 29, Code of Federal Regulations Section 1604.9 (d)].

The guidelines of Equal Employment Opportunity Commission support the City's argument. Section 1604.9 of the Guidelines entitled "Fringe Benefits" states:

> "(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male em-

> ployees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits."

It should also be noted the actions of other federal agencies also support the City's position. Thus, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 172) do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contribution to such plans for employees of both sexes (41 C.F.R. §60-20-3(e)). Moreover, regulations promulgated by the Wage and Hour Administration under the Equal Pay Act 29 U.S.C. 206 (4), provide that payments relating to maternity are not wages for purposes of that statute (20 C.F.R. §800.110), and further state (20 C.F.R. §800.116(d)):

> "If an employer's contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments even though the benefits which accrue to the employees in question are greater for one sex than for the other."

The City is in compliance with the EEOC guidelines since the City treats all of its employees the same as regards its health insurance and there is no distinction in the application, operation, or effect of the insurance plan. The City provides the same benefits to the female depend-

ents of the male employee as it provides the female employees.

In addition, as to medical plans, the employee can choose the Health Insurance Plan (HIP) which provides full medical coverage for pregnancy and pregnancy-related illness.

III. The EEOC regulations relating to disability insurance are not entitled to judicial deference. In any event such regulations should not be applicable to the appellee governmental agencies in the instant case.

On April 5, 1972 the Equal Employment Opportunity Commission issued their *Guidelines On Discrimination Because of Sex* 37 F.R. 6835, 29 C.F.R. 1604.10(b) (herein "Guidelines"). Appellants rely on this section to show that,

> ". . . Pregnancy-related disabilities must, for all job related purposes, be treated the same as other disabilities under any health or temporary disability insurance or other such leave plan available in connection with employment" (Appellants' Brief, p. 32)

Section 1604.10(b), entitled *Employment Policies Relating to Pregnancy and Childbirth,* provides that:

> "(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection

> with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

This Guideline, however, is clearly illogical in light of Title VII and *Aiello*. Footnote 20 in *Aiello* clearly states that

> "Normal pregnancy is an objectively identifiable physical condition with unique characteristics" 417 U.S. at 496.

To say then, as the Guidelines do, that pregnancy is the same as any other disability clearly disregards *Aiello* and the Title VII mandate under which the Guidelines are formulated, which provides only that:

> "It shall be an unlawful employment practice for an employer . . . to discriminate on the basis of sex." 42 U.S.C. §2000e 2(a)(1)

Even, however, if the Guidelines should apply to appellees, they are not entitled to judicial deference for reasons in addition to those stated above. While administrative interpretations may be entitled to "great deference", *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), as appellants point out in their brief at page 32, such "interpretations" are not entitled to "blind adherence", *Espinoza* v. *Farah Manufacturing Company*, 462 F. 2d

1331 (5th Cir. 1972), and are, indeed, invalid where, as is shown above, they conflict with the terms of the statute. *Dewey* v. *Reynolds Metals Company,* 429 F. 2d 324 (6th Cir. 1970) affd. 402 U.S. 689 (1971).

Furthermore, the "courts are free to substitute their judgment for such an administrative interpretation." *Brennan* v. *General Telephone Company of Florida,* 488 F. 2d 157, 160 (5th Cir. 1972). Indeed the EEOC interpretations have been held not to be binding upon the courts. *H. Kessler and Co.* v. *Equal Employment Opportunity Com'n.,* 472 F. 2d 1147 (5th Cir. 1972).

The appellants' use of *Griggs* v. *Duke Power Co.,* (*op. cit.*) to show that "The Commission Guidelines . . . are, of course, entitled to great deference," overlooks the fact that in *Griggs* the court did not accept the Commission's interpretation until it found that "the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent" 401 U.S. at 436.

This use of surrounding circumstances to judge the deference due to an administrative interpretation are clearly in line with the United States Supreme Court's earlier view in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944):

> "The weight of . . . [the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The history of the Guidelines in the instant case clearly shows that they are inconsistent with the previous Guide-

lines and opinion letters of the general counsel of the commission, as well as the guidelines of other governmental agencies. The present Guidelines, relied upon by the appellant, have only been the EEOC position since April, 1972.

Prior to that date, and since November 1965 (30 F.R. 14926), the EEOC issued guidelines on discrimination because of sex, which were later amended, but these guidelines made no mention respecting the treatment of disabilities resulting from pregnancy. 30 F.R. 14926; 33 F.R. 3344; 34 F.R. 13367.

The opinion letters of the general counsel of the EEOC clearly stated the EEOC's position as regards treatment of pregnancy as a disability (letter dated October 17, 1966, released December 9, 1966, published CCH Employment Practices December 21, 1966) which reads as follows:

> "In a recent opinion letter regarding pregnancy, we have stated, 'The commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

This letter was published until May, 1971, with a summary published on April 22, 1971. On April 4, 1972 the

present Guidelines were published without evidentiary support or an opportunity for public review.

While appellees realize that the EEOC need not be bound by its original position for all time and that merely because the Guidelines were adopted many years after Title VII was enacted, this does not automatically invalidate them, the appellees must point out to this Court that consistency, thoroughness, contemporaneousness, and relevance are necessary if the Guidelines are to be given judicial deference.

In *F.T.C.* v. *Jantzen, Inc.*, 356 F. 2d 253 (9th Cir. 1966), rev'd other grounds 386 U.S. 228 (1967) the court said:

> "The Commission's present position is directly contrary to the position that it took then. This does not necessarily mean that its present view is wrong. [and at footnote 4]
>
> "(4) We think that it does mean, however, that we owe little if any, deference to the Commissioner's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to drastically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute * * *" 356 F. 2d at 257.

In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), the Supreme Court refused to follow the Guidelines of the EEOC. The reasons given by the Court, in part, were that the Guideline position was not consistent with the "general understanding" of the term "national origin" as shown by federal regulations and various

state statutes and that the Guideline position was contrary to an earlier Commission opinion "expressed through its general counsel".

In *Newman* v. *Delta Airlines Inc.*, 374 F. Supp. 238, 245-6 (N.D. Ga. 1973), the instant Guidelines on pregnancy and childbirth were refused deference in this case which held that no sex discrimination was shown "because pregnancy is neither a sickness nor a disability." The court noted in *Newman,* that the Guidelines had been issued almost eight years after the enactment of the [Civil Rights] Act [of 1972]." The conclusion of the court was that the Guidelines were not worthy of judicial deference because there "appears no factual basis upon which these regulations were drawn."

Even assuming that the guidelines of the EEOC relating to disability payments were to be given judicial deference, such guidelines should not be applied to the unique situation presented in this case.

The union welfare funds are funded by contributions from the City of $350[4] per annum for each employee in a title covered by the union (211a). These funds are then used by the unions as representative of the employees to purchase such additional benefits as they see fit to supplement the City's employees insurance program. All employees in the covered titles receive the same benefits whether or not they are members of the union. These benefits cost the City in excess of $100,000,000 annually (211a) and concessions have been made by certain unions to reduce the cost to the City of this fringe benefit during the City's budget crisis.

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[4] An increase of $50 from the former amount of $300 effective July 1, 1974.

It should be emphasized that:

(a) Appellee governmental agencies have no disability payment plan for their employees. Instead, such employees, if disabled, have sick leave benefits, workmen's compensation benefits, and annual leave benefits.

(b) The disability plans under attack in this case are administered by various welfare funds comprised of trustees appointed by the unions. The union plans have no relation to one another. The trustees decide what benefits shall be given, which benefits may include dental insurance, prescription drugs, optical plans, or life insurance. Illustrative of this is the fact that the Faculty Conference of the City University of New York provides full grounds for maternity coverage. The Police Benevolent Association provides an additional $70 maternity benefit for maternity (211a). The City's role is to allocate a specific sum of money for each employee in various titles to the union and the union decides on what benefits are to be offered. In addition, the union can provide benefits of its own, funded by the dues it receives from its members.

(c) This Court can take judicial notice that there are thousands of City employees such as attorneys, engineers, nurses etc. who do not belong to the unions who are defendants in this case, and that their associations or unions may not have chosen to spend their money on a disability payment plan. Assuming one of the defendant unions is compelled to include pregnancy as a disability, such union can simply vote to discard its entire disability payment plan.

As has been stated before, the defendant Social Services Employees' Union Welfare Fund does have a disability payment plan which covers pregnancy in a change of policy made unilaterally prior to the institution of this

litigation and has made payment arising from pregnancy-related disabilities of several of the named plaintiffs (114a-119a). Such a policy change permitting coverage for pregnancy-related disabilities undertaken unilaterally by this welfare fund disproves the allegation that the City is discriminating against its female employees.

In creating benefit programs, the City and the municipal unions arrive at a balanced program of many benefits which they believe are the best possible to serve overall employee needs. Any such package, obviously, cannot meet *all* employee needs. The City must carefully allocate its limited and strained resources in order to obtain for its employees the best possible policy package. Nevertheless, in comparison to the programs of other governmental agencies, the City's program is most generous. In addition to the City-wide health package, the City uniquely advances the welfare of its employees by its contributions to the various municipal union welfare funds, thereby allowing City employees to choose their own additional coverage.

A ceiling must exist in all fringe benefit packages. In the present case the City and the union welfare funds have chosen to limit some benefits in favor of others. One of the many benefits so limited is the benefit available for pregnancy. Adding additional maternity coverage to the City's insurance policy would cost the City millions of dollars. In view of the City's continuing budgetary crisis, any such additional cost to extend the benefits of just part of one of the covered risks would heavily burden the resources available and might result in the reduction or elimination of other risks now covered. (See *Aiello* at p. 495-6)

IV. No valid cause of action exists against appellees with respect to maternity leave policies and plaintiffs are not entitled to injunctive and declaratory relief or monetary damages. Moreover, a prior class action is pending against all City agencies in the District Court of the Southern District of New York.

The defendant City agencies are not subject to the declaratory and injunctive relief or monetary damages demanded in the complaint as to the maternity leave policies since this aspect has been rendered moot. The City of New York and the Board of Education now provide the same leave policies to its pregnant employees as to other employees who are ill and there is no mandatory date for beginning a maternity leave.

The changes in the City's leave policy predate the commencement of this action. The City adopted Personnel Order No. 361/72, effective September 1, 1972, which formalized a directive of Deputy Mayor Hamilton, effective January 19, 1972, which amended the leave regulations under the Career and Salary. Appellants are well aware that the former leave policies have been changed and the dates when the new policies were put into effect (39a, 41a). It should also be noted that some agencies such as the Human Resources Administration changed their policies sometime in 1971. The Board of Education, by its by-laws, changed its policy effective September 1, 1973 for employees coming under their jurisdiction.

Two cases involving changed maternity leave policies, *Locke* v. *Board of Public Instruction of Palm Beach Co.*, 8 EPD ¶9635 (5th Cir. Aug., 1974) and *Guelich* v. *Mounds View Independent Pub. Sch. Dist. No. 621,* 334 F. Supp. 1276 (D. Minn. 1972) discuss the applicable law. In

the *Locke* case the court found that the issues as to the individual plaintiff and the class were moot even though neither side had argued it, and stated:

> "For all intents and purposes the controversy between Eunice Locke, the alleged class she represents, and Palm Beach County Board of Instruction has ended. While a declaration of her rights might be undertaken, this would merely be a hypothetical ruling as between these parties. Furthermore, the maternity leave policy which allegedly violates the rights of the alleged class no longer exists."

In *Guelich* an action was brought pursuant to the Civil Rights Act, 42 U.S.C. §1983 challenging the constitutionality of the administrative policy of the defendant school district with regard to compulsory maternity leave. Subsequent to the commencement of the lawsuit, the board amended its bylaws eliminating the provisions of which plaintiff complained. Ruling on defendants' motion to dismiss for failure to state a claim upon which relief may be granted, the court granted summary judgment and said, at p. 1278:

> "It is clear that the federal courts are not empowered to decide moot questions or issue advisory opinions. *North Carolina* v. *Rice,* 404 U.S. 244, 92 S.Ct. 402, 30 L. Ed. 2d 413 (1971); *United States* v. *Alaska Steamship Co.,* 253 U.S. 113, 40 S. Ct. 448, 84 L. Ed. 808 (1920) . . . the case may become moot if the cause ceases to exist or if the defendant can demonstrate that there would be no reasonable expectation that the wrong will be repeated. *Sears, Roebuck & Co.* v. *Carpet, Etc. Layers Local Union No. 419,* 397 U.S. 655, 90 S. Ct. 1299, 25 L. Ed. 2d 637 (1970); *United States* v. *W. T. Grant*

Co., 345 U.S. 629, 73 S. Ct. 894, 97 L. Ed. 1303 (1953); *Solien* v. *Misc. Drivers & Helpers Union Loc. No. 610,* 440 F. 2d 124 (8th Cir. 1971), cert. denied, 403 U.S. 905, 91 S.Ct. 2206, 29 L. Ed. 2d 680 (1970); *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945)."

The case cited by the appellants, *Vineyard* v. *Hollister Elementary School District,* 8 FEP cases 1009 (N.D. Cal., 1974), is not germane to this controversy since the court found the case was not moot where a school board had rescinded its maternity leave policy but had *not* adopted a new policy.

This Court should take note that even when the defendants' prior policies were in effect, they apparently were honored more in the breach than in their observance. This is shown by the complaint which states that a number of the named plaintiffs commenced their leave concurrently with their confinement, i.e. plaintiff Boyarsky commenced leave March 1, 1973 and gave birth on March 7, 1973 (8a). Plaintiff Cantelmi commenced leave December 23, 1972 and gave birth on December 29, 1972 (10a). Plaintiff Zises commenced leave on January 3, 1973 and gave birth on that date (13a). Plaintiff Blitz commenced leave on March 15, 1973 and gave birth on that date (14a). Plaintiff Shah commenced leave on November 27, 1972 and gave birth on November 28, 1972 (17a). In addition, almost all of the other named plaintiffs worked beyond the time in which plaintiffs claim the prior leave policies would have compelled them to.

In this case, there should be no award of back pay as prior to the judicial determination in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), declaring that certain mandatory leave provisions were illegal under Title VII, the instant appellee governmental agencies had

changed their basic policies, which had been enacted in good faith, so as to correct what was later found to be illegal in *LaFleur*. See also *Williams* v. *General Foods Corp.*, 492 F. 2d 399 (7th Cir. 1974); *Manning* v. *International Union*, 466 F. 2d 812 (6th Cir. 1972); *Kober* v. *Westinghouse Electric Corporation*, 480 F. 2d 240 (3rd Cir. 1973).

In addition to the reasons stated above, based on the facts of this case, the dismissal of this action should be affirmed because there is pending in the district court of the Southern District of New York an action entitled *Monell, et al.* v. *Department of Social Services of the City of New York* (214a) where the maternity leave regulations of the agencies of the City, including the Board of Education, are involved. That suit, commenced in 1971, is still pending and the named plaintiffs in the *Monell* case are all employees of the Board of Education and the Department of Social Services and, except for one plaintiff, the named plaintiffs in the instant case are also employed by these same two agencies.

In a memorandum opinion by Judge Motley in the *Monell* case, the court determined that the *Monell* case could be maintained as a class action, including as plaintiffs the "numerous women employees in the City of New York's many agencies."

A comparison of the two cases and the complaint in *Monell* (218a-231a) shows that the same class is alleged to be represented as in the instant case. The defendant City agencies are the same in both cases and the subject matter of the plaintiffs' causes of the action, numbers 7 through 11 in the instant case, will litigate the same issues that are raised by the *Monell* case.

CONCLUSION

Whereas Appellants have declined to replead, the District Court's order dismissing the Complaint should be affirmed.

Dated: New York, New York
February 27, 1975

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel of the
City of New York
1553 Municipal Building
New York, New York 10007
Tel. No. 212-566-4467
Attorney for Defendants-Appellees: The City of New York; Abraham Beame as Mayor of the City of New York; Harry Bronstein, as City Personnel Director; New York City Health and Hospitals Corporation; New York City Off-Track Betting Corporation; Joseph Monserrat, Seymour P. Lachman, Isaiah E. Robinson, Jr., Mary E. Meade, Constituting the *Board of Education of the City of New York.*

DAVID W. FISHER,
CHARLES W. SEGAL,
EDWARD H. BECK,
Of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

f New York, County of New York, ss.:

Edward Beck being duly sworn, says that on the 28th day
ebruary 1975, he served the annexed Brief of Appellees upon
ard W. Nolan Esq., the attorney for the Co-Appellees
by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
States in said city directed to the said attorney at No. 250 Broadway in the
h of Manhattan, City of New York, being the address within the State theretofore designated by
that purpose.

to before me, this
day of Feb 1975 Edward Beck

DAVID W. FISHER
Notary Public, State of New York
24-1229610 Qualified in Kings Co.
Commission Expires March 30, 19 75

Form 323-30M-701127(70)

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

f New York, County of New York, ss.:

Edward Beck being duly sworn, says that on the 28th day
ebruary 1975, he served the annexed Brief of Appellees upon
n, Sillcocks, Edelman & Knapp Esq., the attorney for the Co-Appellees
by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
States in said city directed to the said attorney at No. 375 Park Ave in the
h of Manhattan, City of New York, being the address within the State theretofore designated by
that purpose.

to before me, this
day of Feb 1975 Edward Beck

DAVID W. FISHER
Notary Public, State of New York
24-1229610 Qualified in Kings Co.
Commission Expires March 30, 19 75

Form 323-30M-701127(70)

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Edward Beck being duly sworn, says that on the 28th day of February 1975, he served the annexed Brief of Appellees upon Bertram Perkel Esq., the attorney for the Co-Appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 150 East 58th Street in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

28th day of Feb 1975 Edward Beck

DAVID W. FISHER
Notary Public, State of New York
No. 24-1229610 Qualified in Kings Co.
Commission Expires March 30, 1975

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Edward Beck being duly sworn, says that on the 28th day of February 1975, he served the annexed Brief of Appellees upon Julius Topel Esq., the attorney for the Co-Appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 140 Park Place in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

28 day of Feb 1975 Edward Beck

DAVID W. FISHER
Notary Public, State of New York
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Commission Expires March 30, 1975

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Edward Beck being duly sworn, says that on the 28th day of February 1975, he served the annexed Brief of Appellees upon Miriam, Berre, Soltzstein & Gordon Esq., the attorney for the Co-Appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 98 Cutter Mill Road in the ~~Borough of ..... City of New York,~~ being the address within the State theretofore designated by him for that purpose. Great Neck, Long Island 11021

Sworn to before me, this
28th day of Feb 1975

Edward Beck

DAVID W. FISHER
Notary Public, State of New York
No. 24-1229610 Qualified in Kings Co.
Commission Expires March 30, 1975

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Edward Beck being duly sworn, says that on the 28th day of February 1975, he served the annexed Brief of Appellees upon Breed, Abbott & Morgan Esq., the attorney for the Co-Appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 1 Chase Manhattan Plaza in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
28th day of Feb 1975

Edward H. Beck

DAVID W. FISHER
Notary Public, State of New York
No. 24-1229610 Qualified in Kings Co.
Commission Expires March 30, 1975

Form 323-30M-701127(70)

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F NEW YORK
OF NEW YORK } ss.:

Edward Beck

sworn, says that on the 28th day of Feb 19 75

0 East 42nd St In the Borough of Manhattan in New York City, he served a copy

xed Brief of Appellees upon Robinowitz Boudin & Standard Esq.,

y for the Appellants in the within entitled action, by delivering

he same to a person in charge of said Attorney's office, and leaving the same with him.

n to before me, this 28th

of Feb 19 76

Edward H. Beck

-1022026(57)

DAVID M. FISHER
Notary Public, State of New York
No. 24-1220[illegible]
Qualified in Kings Co.
Commission Expires March 30, 19[illegible]

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